SUPREME COURT, U. S.
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No. 71-382

In the Supreme Court of the United States

OCTOBER TERM, 1971

GILES A. WANAMAKER, JR., PETITIONER

v.

JOHN C. RILEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
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Petitioner, a major in the Air Force Reserve and member of an activated reserve unit, brought this action in a Michigan state court. The complaint had two counts against respondent, his commanding officer: (1) defamation based on alleged defamatory statements about him made at Selfridge Air Force Base, Michigan, to other members of the unit; (2) abuse of process for alleged wrongful initiation of disciplinary proceedings.[1] The cause was removed to the United States

[1] In a third count, petitioner alleged that defamatory statements were made about him by another superior officer who was joined as a co-defendant. This count was later dismissed under a consent order.

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District Court for the Eastern District of Michigan under 28 U.S.C. 1442(a)(1).

In support of the defamation count, petitioner alleged that, in the latter part of 1968, respondent told others that "Major Wanamaker is a modern Benedict Arnold" and that "Major Wanamaker is a traitor to his country" (Pet. App. 9a). With respect to the abuse of process count, he claimed that respondent had wrongfully caused an investigation to be initiated against him, and had attempted to have him court-martialed.

Respondent moved for summary judgment and dismissal of the complaint on the ground that the alleged statements and activities complained of were made in connection with his official duties and were therefore absolutely privileged. He filed an affidavit stating that he was commanding officer of the 305th Aerospace Rescue and Recovery Squadron at Selfridge Air Force Base, Michigan, at the time in question; that petitioner was assigned to his unit which had been activated; that public statements and activities by petitioner criticizing the activation of the squadron were in his opinion having a detrimental effect upon his command and upon the reserve program as a whole; and that his statements and activities respecting petitioner were made by reason of his position as commanding officer.

Petitioner filed various affidavits. They showed that respondent's allegedly defamatory statements had been made to various members of the unit in the squadron-orderly room and on the Selfridge Base; that the

remarks had been made in connection with certain television and newspaper reports of dissension within the squadron; and that they were made both during and after regular duty hours. Petitioner also filed a deposition of one unit member[2] which showed that respondent's statements were made in the following context:

> I remember, probably in December of '68, a news report. Colonel Riley and some staff members, Sergeant Nice and Airman Sienel, a clerk-typist from personnel and myself were discussing this newscast that referred to a bunch of dissident reservists at Selfridge headed by Major Wanamaker. It was a rather lively discussion about the newscast. At this time Colonel Riley referred to Major Wanamaker [as a modern day Benedict Arnold].
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> * * * * *
>
> [He used other language] to the effect that for every bad apple in a barrel, you have got a bunch of good ones. He didn't want one bad apple to spoil the good ones.

The deposition further indicated that the unit had been activated in response to the Pueblo incident, but had not performed duties in connection with that affair. The dissidents, headed by petitioner, were objecting to the continued activation of the unit under these circumstances, and had brought their opinions to the public through the news media.

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[2] Relevant excerpts from this deposition are reproduced in the appendix to respondent's court of appeals' brief, a copy of which is being lodged with the Clerk of this Court.

At the hearing on respondent's motion to dismiss, petitioner admitted that his complaint was based entirely upon statements made by his commanding officer at Selfridge Field and within his own reserve unit group.

The district court, relying on *Barr* v. *Matteo,* 360 U.S. 564, and *Gregoire* v. *Biddle,* 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949, dismissed the complaint on the ground that respondent, as commanding officer, was responsible for the discipline of his unit and his statements and actions while acting in that capacity were absolutely privileged (Pet. App. 3a–7a). Noting that "the language used was stronger than necessary," the court nevertheless held that respondent's "statements are within the outer perimeter of his duty to maintain discipline and inform those under his command of proscribed conduct. Such *internal* statements constitute a part of the defendant's official duties and consequently come under the protective shield of absolute privilege" (Pet. App. 6a; emphasis in original).

Petitioner took an appeal only from the dismissal of the defamation count, and the court of appeals affirmed on the basis of *Barr* v. *Matteo, supra* (Pet. App. 1a–2a).

1. Petitioner argues here, as he did below, that reliance on *Barr* v. *Matteo,* 360 U.S. 564, is misplaced because the plurality opinion in that case failed to command a majority of the Court and thus "is neither settled law nor * * * entitled to binding precedent under the doctrine of *stare decisis*" (Pet. 6). We do

not agree. The rule that emerged from *Barr* is that statements by federal officials made within the outer perimeter of their official duties are entitled to absolute immunity. Whatever their other differences, five members of the Court agreed that such an absolute privilege must be recognized in the absence of a federal statute to the contrary. The lower federal courts have since consistently followed *Barr*.[3]

2. In the circumstances of this case, the courts below properly held that *Barr* applies. See also *Howard*

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[3] See *Denman* v. *White*, 316 F. 2d 524 (C.A. 1); *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655 (C.A. 2), certiorari denied, 374 U.S. 827; *Keiser* v. *Hartman*, 339 F. 2d 597 (C.A. 3), certiorari denied, 381 U.S. 934; *Bowman* v. *White*, 388 F. 2d 756 (C.A. 4), certiorari denied, 393 U.S. 891; *Chafin* v. *Pratt*, 358 F. 2d 349 (C.A. 5), certiorari denied, 385 U.S. 878; *Molever* v. *Lindsey*, 411 F. 2d 597 (C.A. 6); *Scherer* v. *Morrow*, 401 F. 2d 204 (C.A. 7), certiorari denied, 393 U.S. 1084; *Ruderer* v. *Meyer*, 413 F. 2d 175 (C.A. 8), certiorari denied, 396 U.S. 936; *Urbina* v. *Gilfilen*, 411 F. 2d 546 (C.A. 9); *Chavez* v. *Kelly*, 364 F. 2d 113 (C.A. 10); *David* v. *Cohen*, 407 F. 2d 1268 (C.A.D.C.).

Petitioner is not correct in his asssertion that *Kelley* v. *Dunne*, 344 F. 2d 129 (C.A. 1), "does not follow the absolute privilege rule" (Pet. 7). In *Kelley*, it was alleged that a postal inspector had forceably entered a private home asserting that he had a warrant charging the owner with robbery, when he knew he had no such warrant. The court concluded that the absolute privilege did not apply since the conduct of the postal inspector was not within the outer perimeter of his duties. The court reasoned that (344 F. 2d at 133) "[t]here would be no serious hamstringing of the activities of postal inspectors if, in the absence of a warrant, they were obligated, to some extent, to defend their actions." Thus that decision did not reject *Barr* but merely turned on the First Circuit's conclusion that the conduct involved was not within the outer perimeter of the official's duties.

v. *Lyons*, 360 U.S. 593. The respondent's allegedly defamatory statements came within the outer perimeter of his official duty to maintain discipline and morale within his unit as commanding officer. Perhaps, as the district court stated, the statements were "stronger than necessary," but they nevertheless were made as a part of respondent's responsibilities as commanding officer.

Nor is petitioner correct in his claim that the question whether respondent's statements were made within the outer perimeter of his duties was for a jury to decide. Petitioner does not contest that the alleged statements were made by his commanding officer to other members of the unit on the Air Force Base where they were stationed. Nor has he rebutted respondent's affidavit that the allegedly defamatory remarks were a direct response to petitioner's public criticism of the unit's activation, and were made by respondent in his capacity as commanding officer in order to maintain discipline and morale within the unit. In these circumstances, there was no genuine issue of material fact to be submitted to, and resolved by, a jury. See *Denman* v. *White*, 316 F. 2d 524, 527, n. 2 (C.A. 1); *Preble* v. *Johnson*, 275 F. 2d 277, 279 (C.A. 10).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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